

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIAN SCOTT GUIDRY, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF THE
INTERIOR, et al.,

Defendants.

ALCATRAZ CRUISES, LLC

Cross-Claimant,

v.

GOLDEN GATE NATIONAL PARKS
CONSERVANCY,

Cross-Defendant.

Case No.: 12-cv-5639 JSC

**ORDER: DENYING ALCATRAZ
CRUISES, LLC'S RENEWED
MOTION FOR SUMMARY
ADJUDICATION (Dkt. No. 84)**

This tort action arises from alleged injuries suffered by Brian Scott Guidry and Peggy Kuykendall ("Plaintiffs") while riding a tram on Alcatraz Island. Now pending before the Court is the renewed motion of Defendant/Cross-Claimant Alcatraz Cruises, LLC ("Alcatraz") for partial

1 summary adjudication (“Renewed Motion”) on its breach of contract cross-claim against Defendant
2 Golden Gate National Parks Conservancy (“the Conservancy”). (Dkt. No. 84.) After carefully
3 considering the parties’ submissions, and having had the benefit of oral argument on February 6,
4 2014, the Court DENIES the motion without prejudice.

5 **BACKGROUND**

6 The Conservancy and Alcatraz are co-defendants. Alcatraz sued the Conservancy based on
7 the Conservancy’s breach of the Visitor Services Agreement (“VSA”), which obligated the
8 Conservancy to name Alcatraz as an additional insured party under the Conservancy’s insurance
9 policy. The VSA did not name a particular insurer or policy, but the Conservancy carries an
10 insurance policy with Chubb Group of Insurance Policies (“Chubb”). Contrary to the plain terms of
11 the VSA, Alcatraz was not named as an additional insured on the Conservancy’s Chubb Policy.
12 Thus, when Alcatraz tendered its claim to Chubb, Chubb denied coverage because Alcatraz was not a
13 named insured. As indicated by the record, all of Alcatraz’s legal costs have been paid under a policy
14 issued by its own insurer, American International Group (“AIG”), and underwritten by National
15 Union Fire Insurance Company.

16 In October 2013 Alcatraz filed its initial motion for summary adjudication (“initial motion”)
17 against the Conservancy to recoup legal costs caused by the Conservancy’s breach of the VSA’s
18 additional insured clause. (Dkt. No. 44.) A month later, the parties appeared before the Court for a
19 hearing on the initial motion. At the hearing, the Court determined that Alcatraz could not claim
20 AIG’s legal costs as damages for breach of contract as long as Alcatraz’s insurer was not a party to
21 this action. The Court subsequently denied Alcatraz’s initial motion for the reasons stated at the
22 hearing, but granted Alcatraz leave to amend. (Dkt. No. 65.) Although AIG has since filed its own
23 case against the Conservancy, and that case is now related to this action, AIG has not moved to
24 intervene in this action or otherwise become a party to this action.

25 **LEGAL STANDARD**

26 Summary judgment is appropriate if “there is no genuine dispute as to any material fact and
27 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears
28 the burden of producing evidence negating an essential element of each claim on which it seeks

1 judgment or showing that the nonmoving party cannot produce evidence sufficient to satisfy its
 2 burden of proof at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th
 3 Cir. 2000). “[T]he inferences to be drawn from the underlying facts contained in such materials must
 4 be viewed in the light most favorable to the party opposing the motion.” *United States v. Diebold,*
 5 *Inc.*, 369 U.S. 654, 655 (1962).

6 Once the moving party meets its burden, the nonmoving party must show that a material
 7 factual dispute exists. *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). If the nonmoving
 8 party fails to do so, “the moving party wins the motion for summary judgment.” *Nissan Fire*, 210
 9 F.3d at 1103. “But if the nonmoving party produces enough evidence to create a genuine issue of
 10 material fact, the nonmoving party defeats the motion.” *Id.*

11 DISCUSSION

12 A. Breach of Contract

13 Alcatraz renews its motion for partial summary judgment on its breach of contract claim
 14 against the Conservancy. In particular, it seeks a ruling that the Conservancy breached its VSA
 15 obligation to name Alcatraz as an additional insured and therefore is liable to Alcatraz for Alcatraz’s
 16 legal fees, costs and damages incurred in this action to the extent the Conservancy’s insurer—
 17 Chubb—would have covered those costs if Alcatraz had been named as an additional insured.

18 “[T]he elements of a cause of action for breach of contract are (1) the existence of the contract,
 19 (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting
 20 damages to the plaintiff.” *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). The first
 21 three elements of this claim are not in dispute: (1) the VSA was a contract under which (2) Alcatraz
 22 performed its obligations and (3) the Conservancy breached by not naming Alcatraz as an additional
 23 insured. However, with respect to the fourth element, damages, the Renewed Motion presents the
 24 Court with the same problem that existed at the hearing three months ago: Alcatraz is seeking relief
 25 for damages that it has not incurred. At oral argument Alcatraz claimed that it paid a \$5000
 26 deductible, but the record does not reflect any such payment and Alcatraz had not previously relied on
 27 its deductible to support its damages claim. Rather, the damages reflected in the record belong to
 28 AIG, which has paid all of Alcatraz’s costs and is not a party to this claim in this lawsuit. Alcatraz

1 thus has not satisfied the damages element, a necessary element of a breach of contract claim. *See*
 2 *Patent Scaffolding v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506, 511 (1967) (“A breach of
 3 contract without damage is not actionable.”); *see also Bramalea Cal., Inc. v. Reliable Interiors, Inc.*,
 4 119 Cal. App. 4th 468, 473 (2004) (same). In *Patent Scaffolding*, a subcontractor’s equipment was
 5 destroyed in a fire, which was fully compensated by the subcontractor’s insurer. *Id.* at 508. Although
 6 the contractor had failed to name the subcontractor as an additional insured, the court held that
 7 because the insurer fully compensated the subcontractor for the loss from the fire, the subcontractor
 8 had no damage and therefore could not state a claim for breach of contract against the contractor. *Id.*
 9 at 511. Under *Patent Scaffolding*, Alcatraz cannot itself recover for losses that were covered by its
 10 own insurer.

11 That Alcatraz is insured, however, does not mean that the Conservancy is necessarily off the
 12 hook for its breach of its agreement to add Alcatraz as an additional insured. An insured’s inability to
 13 show damages does not defeat an insurer’s equitable subrogation claim. *Interstate Fire and Cas. Ins.*
 14 *Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 35 (2010). Alcatraz thus contends that the
 15 Court may decide its motion in its favor because (1) AIG has asserted an interest in the matter through
 16 its complaint filed in the related case, and (2) AIG is actually bringing the breach of contract action
 17 claim in this action in the name of its insured, Alcatraz.

18 The technical problem with the first argument is that while AIG’s new action has been related,
 19 the pending motion was brought by Alcatraz in this action. (Case No. 12-cv-5639-JSC, Dkt. No. 84.)
 20 While the motion certainly evinces AIG’s interest in this matter, Alcatraz does not cite any authority
 21 to support its implicit assertion that the existence of AIG’s separate action somehow means that
 22 *Alcatraz’s* claim can now be adjudicated. As for the second argument, it is just that—argument—
 23 raised for the first time at the hearing on the motion. There is nothing in the record that supports
 24 Alcatraz’s assertion that on its cross-claim against the Conservancy it is actually asserting the
 25 subrogation rights of AIG, that is, that it is actually AIG suing in the name of its insured. While the
 26 Court recognizes that insurers and insureds may proceed in this matter, *see, e.g., Patent Scaffolding*,
 27 256 Cal. App. 2d at 507 (reciting that the insurers brought the action in the name of the insureds), in
 28 this case the Conservancy has made a specific objection and thus the Court is compelled to follow the

1 technical rules. In order to avoid the need for any further motion practice, however, Alcatraz and the
2 Conservancy shall meet and confer as to how AIG may assert its subrogation and/or contribution
3 rights in this action and are encouraged to submit a stipulation to that effect. If necessary, the Court
4 will further discuss the issue with the parties at the March 6, 2014 case management conference.

5 **B. Equitable Subrogation**

6 All that being said, the question remains whether through a claim for equitable subrogation
7 AIG can seek damages from the Conservancy for the Conservancy's breach of its agreement to name
8 Alcatraz as an additional insured. It can. "Subrogation is defined as the substitution of another
9 person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or
10 claim." *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1291 (1998). "In the
11 case of insurance, subrogation takes the form of an insurer's right to be put in the position of the
12 insured in order to pursue recovery from third parties legally responsible to the insured for a loss
13 which the insurer has both insured and paid." *Id.* at 1291-92.

14 "The most common subrogation action is one brought on behalf of an insurer against a
15 wrongdoer whose wrong caused the loss." *Patent Scaffolding*, 256 Cal. App. 2d at 511-12. Thus,
16 separate and apart from the Conservancy's breach of the additional insured requirement, AIG could
17 bring an action against the Conservancy if it believed the Conservancy's conduct was a cause of the
18 accident that led to the lawsuit against Alcatraz. On its motion, however, Alcatraz (AIG) is not
19 claiming that the record supports a finding as a matter of law that the Conservancy's negligence
20 caused the accident (and thus AIG's damages). Instead, it is claiming that AIG's loss was caused by
21 the Conservancy's failure to name Alcatraz as an additional insured. *Patent Scaffolding*, however,
22 defeats such a claim. There the court held that because the insurer's loss was caused by the fire, "the
23 very risk" which it had assumed, and the contractor's failure to name the subcontractor as an
24 additional insured "had nothing to do with the fire," the insurer could not pursue a claim for equitable
25 subrogation against the contractor. *Id.* at 512. The court thus concluded:

26 Where two parties are contractually bound by independent contracts to indemnify the
27 same person for the same loss, the payment by one of them to his indemnitee does not
28 create in him equities superior to the nonpaying indemnitor, justifying subrogation, if
the latter did not cause or participate in causing the loss.

1 *Id.* at 514. Thus, AIG does not necessarily have the right to recover from the Conservancy what it has
 2 paid and will pay to defend Alcatraz. In other words, if the Conservancy had named Alcatraz as an
 3 additional insured on the Chubb policy, Alcatraz/AIG has not established that Chubb, rather than
 4 AIG, would have had to cover Alcatraz's loss given that each party would have been contractually
 5 bound to cover the loss. *See Interstate Fire*, 182 Cal. App. 4th at 32 (“[S]ubrogation may not be
 6 obtained even as to contractual indemnity claims unless the insurer is in an equitable position superior
 7 to that of the defendant.”).

8 *Interstate Fire* does not support Alcatraz's motion for summary judgment. There the court
 9 merely held that the insurer could state a claim for equitable subrogation based on the defendant's
 10 breach of contract because the insurer had sufficiently alleged that it was in a superior position to the
 11 defendant. *Id.* at 37-42. This holding was based, in part, on the insurer's allegation that the defendant
 12 caused the loss due to its own negligence. *Id.* at 39 (Stating that the defendant “is not only alleged to
 13 be liable for the loss under a contractual provision, it is also alleged to have caused the loss.”). As
 14 explained above, Alcatraz has not established as a matter of law that the Conservancy's wrongdoing
 15 caused the accident that led to its, or more precisely AIG's, loss.

16 Alcatraz appears to insist that because the Conservancy was involved in the accident that led
 17 to its loss (because the tram driver was employed by the Conservancy) Alcatraz is in the superior
 18 position. The cases cited do not support Alcatraz's position. None holds that merely being involved
 19 with an accident, as opposed to at fault, makes a defendant liable to the insurer. Thus, even though it
 20 is undisputed that the Conservancy breached its contract with Alcatraz, summary judgment must be
 21 denied. Alcatraz has not established as a matter of law that it/AIG is in a superior equitable position
 22 to the Conservancy. The most the Court could say is that the Conservancy is liable to AIG to the
 23 extent the amounts paid by AIG on Alcatraz's behalf would have been covered by the Chubb policy
 24 and Alcatraz is determined to be in an equitably superior position to the Conservancy. But on this
 25 record Alcatraz has not established either of those issues in its favor as a matter of law. Alcatraz's
 26 motion must therefore be denied.

27 The Court is not denying Alcatraz's motion because of the VSA's indemnity provisions. The
 28 Conservancy's pending indemnification claim arises from Alcatraz's obligation under the VSA's

1 indemnity clause. (VSA ¶ 4.2, Dkt. No. 84-2 at 5.) Alcatraz's breach of contract claim arises from
2 the Conservancy's breach of the VSA's insurance clause. (VSA ¶ 4.3, Dkt. No. 84-2 at 6.) These are
3 separate, independent clauses within the contract and do not limit or cancel one another. *See Shell*
4 *Oil Co. v. Nat'l Union Fire Ins. Co.*, 44 Cal. App. 4th 1633, 1641 (1996) (contract's indemnity
5 provision did not limit the scope of the contract's separate insurance provision); *Chevron U.S.A., Inc.*
6 *v. Bragg Crane & Rigging Co.*, 180 Cal. App. 3d 639, 642 (1986) (contract's indemnity provision,
7 which did not cover acts of sole negligence, did not limit that scope of a separate insurance provision,
8 which did not contain any similar limitations); *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422,
9 426 (9th Cir. 1980) (contract's separate indemnity and insurance provisions provided mutually
10 satisfactory means of resolving claims).

11 CONCLUSION

12 For the reasons stated, the Court DENIES Cross-Claimant's renewed motion for summary
13 adjudication without prejudice.

14 IT IS SO ORDERED.

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16 Dated: February 25, 2014

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18 JACQUELINE SCOTT CORLEY
19 UNITED STATES MAGISTRATE JUDGE
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